

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

GEOTAG, INC.,

v.

2:10-cv-265

FRONTIER COMMUNICATIONS CORP.,
et al.,

GEOTAG, INC.,

v.

2:10-cv-272

YELLOWPAGES.com LLC

GEOTAG, INC.,

v.

2:10-cv-569

GEORGIO ARMANI S.P.A., *et al.*,

GEOTAG, INC.,

v.

2:10-cv-570

AROMATIQUE, INC., *et al.*,

GEOTAG, INC.,

v.

2:10-cv-571

GUCCI AMERICA, INC., *et al.*,

GEOTAG, INC.,

v.

2:10-cv-572

STARBUCKS CORP., *et al.*,

GEOTAG, INC.,

v.

2:10-cv-573

RENT-A-CENTER, INC., *et al.*,

GEOTAG, INC.,

v.

2:10-cv-574

THE WESTERN UNION COMPANY, *et al.*,

GEOTAG, INC.,

v.

2:10-cv-575

ROYAL PURPLE, INC., *et al.*,

GEOTAG, INC.,

v.

2:10-cv-587

YAKIRA, L.L.C., *et al.*,

GEOTAG, INC.,

v.

2:11-cv-175

WHERE 2 GET IT, INC., *et al.*,

GEOTAG, INC.,

v.

2:11-cv-403

ZOOSK, INC.

GEOTAG, INC.,

v.

2:11-cv-404

**EYE CARE CENTERS OF AMERICA, INC.,
et al.,**

GEOTAG, INC.,

v.

2:11-cv-405

CIRCLE K STORES, INC., *et al.*,

GEOTAG, INC.,

v.

2:11-cv-421

AMERCO, *et al.*,

GEOTAG, INC.,

v.

2:11-cv-424

7-ELEVEN, INC., *et al.*,

GEOTAG, INC.,

v.

2:11-cv-425

SUNBELT RENTALS, INC.

GEOTAG, INC.,

v.

2:11-cv-426

CLASSIFIED VENTURES, LLC

GEOTAG, INC.,

v.

2:12-cv-43

CANON INC., et al.,

WHERE 2 GET IT, INC.,

v.

2:12-cv-149

GEOTAG, INC.

GEOTAG, INC.,

v.

2:12-cv-436

AMERICAN APPAREL INC.

GEOTAG, INC.,

v.

2:12-cv-437

ABERCROMBIE & FITCH CO.

GEOTAG, INC.,

v.

2:12-cv-438

AMERICAN EAGLE OUTFITTERS INC.

GEOTAG, INC.,

v.

2:12-cv-439

ANN INC.

GEOTAG, INC.,

v.

2:12-cv-440

NEW ASHLEY STEWART, INC.

GEOTAG, INC.,

v.

2:12-cv-441

BURLEIGH POINT, LTD.

GEOTAG, INC.,

v.

2:12-cv-442

CATALOGUE VENTURES, INC.

GEOTAG, INC.,

v.

2:12-cv-443

BURBERRY LIMITED

GEOTAG, INC.,

v.

2:12-cv-444

**BURLINGTON FACTORY WAREHOUSE
CORPORATION**

GEOTAG, INC.,

v.

2:12-cv-445

CACHE INC.

GEOTAG, INC.,

v.

2:11-cv-446

THE WILLIAM CARTER COMPANY

GEOTAG, INC.,

v.

2:12-cv-447

CHARMING SHOPPES INC.

GEOTAG, INC.,

v.

2:12-cv-448

CHICO'S FAS INC.

GEOTAG, INC.,

v.

2:12-cv-449

CITI TRENDS INC.

GEOTAG, INC.,

v.

2:12-cv-450

CLAIRE'S BOUTIQUES, INC.

GEOTAG, INC.,

v.

2:12-cv-451

COLDWATER CREEK INC.

GEOTAG, INC.,

v.

2:12-cv-452

DAVID'S BRIDAL INC.

GEOTAG, INC.,

v.

2:12-cv-453

DEB SHOPS INC.

GEOTAG, INC.,

v.

2:11-cv-454

DELIAS INC.

GEOTAG, INC.,

v.

2:12-cv-455

DESTINATION MATERNITY CORPORATION

GEOTAG, INC.,

v.

2:12-cv-456

DIESEL U.S.A. INC.

GEOTAG, INC.,

v.

2:12-cv-457

DONNA KARAN INTERNATIONAL INC.

GEOTAG, INC.,

v.

2:12-cv-458

LVMH MOET HENNESSY LOUIS VUITTON INC.

GEOTAG, INC.,

v.

2:12-cv-459

DOTS, LLC

GEOTAG, INC.,

v.

2:12-cv-460

DRAPER'S & DAMON'S INC.

GEOTAG, INC.,

v.

2:12-cv-461

EDDIE BAUER LLC

GEOTAG, INC.,

v.

2:12-cv-462

ESPRIT US RETAIL LIMITED

GEOTAG, INC.,

v.

2:11-cv-463

FACTORY CONNECTION LLC

GEOTAG, INC.,

v.

2:11-cv-464

THE FINISH LINE INC.

GEOTAG, INC.,

v.

2:12-cv-465

FOREVER 21 RETAIL INC.

GEOTAG, INC.,

v.

2:12-cv-466

FORMAL SPECIALISTS LTD.

GEOTAG, INC.,

v.

2:12-cv-467

FREDERICK'S OF HOLLYWOOD STORES INC.

GEOTAG, INC.,

v.

2:12-cv-468

GROUPE DYNAMITE, INC. D/B/A GARAGE

GEOTAG, INC.,

v.

2:12-cv-469

GUESS? RETAIL INC.

GEOTAG, INC.,

v.

2:12-cv-470

H&M HENNES & MAURITZ LP

GEOTAG, INC.,

v.

2:12-cv-471

HANESBRANDS INC.

GEOTAG, INC.,

v.

2:12-cv-472

HOT TOPIC INC.

GEOTAG, INC.,

v.

2:12-cv-473

HUGO BOSS FASHION INC.

GEOTAG, INC.,

v.

2:12-cv-474

J. CREW GROUP INC.

GEOTAG, INC.,

v.

2:12-cv-475

JIMMY JAZZ INC.

GEOTAG, INC.,

v.

2:12-cv-476

JOS. A. BANK CLOTHIERS INC.

GEOTAG, INC.,

v.

2:12-cv-477

ALCO STORES INC.

GEOTAG, INC.,

v.

2:12-cv-478

FRED'S INC.

GEOTAG, INC.,

v.

2:12-cv-479

BAKERS FOOTWEAR GROUP

GEOTAG, INC.,

v.

2:11-cv-480

BROWN SHOE COMPANY INC.

GEOTAG, INC.,

v.

2:12-cv-481

COLLECTIVE BRANDS INC.

GEOTAG, INC.,

v.

2:12-cv-482

CROCS INC.

GEOTAG, INC.,

v.

2:12-cv-483

DSW INC. D/B/A DSW SHOE INC.

GEOTAG, INC.,

v.

2:12-cv-484

FLEET FEET INC.

GEOTAG, INC.,

v.

2:12-cv-485

FOOT SOLUTIONS INC.

GEOTAG, INC.,

v.

2:12-cv-486

GENESCO INC.

GEOTAG, INC.,

v.

2:12-cv-487

HEELY'S INC.

GEOTAG, INC.,

v.

2:12-cv-488

JUSTIN BOOT COMPANY

GEOTAG, INC.,

v.

2:12-cv-520

AMERICAN GREETINGS CORPORATION

GEOTAG, INC.,

v.

2:12-cv-521

HALLMARK CARDS, INC.

GEOTAG, INC.,

v.

2:12-cv-522

HICKORY FARMS INC.

GEOTAG, INC.,

v.

2:12-cv-523

SPENCER GIFTS LLC

GEOTAG, INC.,

v.

2:11-cv-524

INTERNATIONAL COFFEE & TEA, LLC

GEOTAG, INC.,

v.

2:11-cv-525

THINGS REMEMBERED, INC.

GEOTAG, INC.,

v.

2:12-cv-526

THE YANKEE CANDLE COMPANY, INC.

GEOTAG, INC.,

v.

2:12-cv-527

BOSE CORPORATION

GEOTAG, INC.,

v.

2:12-cv-528

GUITAR CENTER INC.

GEOTAG, INC.,

v.

2:12-cv-529

PROGRESSIVE CONCEPTS INC.

GEOTAG, INC.,

v.

2:12-cv-530

24 HOUR FITNESS WORLDWIDE INC.

GEOTAG, INC.,

v.

2:12-cv-531

BALLY TOTAL FITNESS CORPORATION

GEOTAG, INC.,

v.

2:12-cv-532

BARE ESCENTIALS INC.

GEOTAG, INC.,

v.

2:12-cv-533

BIOSCRIP INC.

GEOTAG, INC.,

v.

2:12-cv-534

CRABTREE & EVELYN

GEOTAG, INC.,

v.

2:12-cv-535

CURVES INTERNATIONAL INC.

GEOTAG, INC.,

v.

2:12-cv-536

GOLD'S GYM INTERNATIONAL INC.

GEOTAG, INC.,

v.

2:12-cv-537

GREAT CLIPS INC.

GEOTAG, INC.,

v.

2:12-cv-538

L.A. FITNESS INTERNATIONAL INC.

GEOTAG, INC.,

v.

2:12-cv-539

LIFE TIME FITNESS INC.

GEOTAG, INC.,

v.

2:12-cv-540

M.A.C. COSMETICS INC.

GEOTAG, INC.,

v.

2:11-cv-541

MERLE NORMAN COSMETICS

GEOTAG, INC.,

v.

2:12-cv-542

**VITAMIN COTTAGE NATURAL FOOD
MARKETS, INC.**

GEOTAG, INC.,

v.

2:12-cv-543

REGIS CORPORATION

GEOTAG, INC.,

v.

2:12-cv-544

SALLY BEAUTY SUPPLY LLC

GEOTAG, INC.,

v.

2:12-cv-545

SEPHORA USA INC.

GEOTAG, INC.,

v.

2:12-cv-546

TONI&GUY USA, LLC

GEOTAG, INC.,

v.

2:12-cv-547

ULTA SALON, COSMETICS & FRAGRANCE, INC.

GEOTAG, INC.,

v.

2:12-cv-548

VITAMIN SHOPPE INDUSTRIES, INC.

GEOTAG, INC.,

v.

2:12-cv-549

EYEMART EXPRESS, LTD.

GEOTAG, INC.,

v.

2:12-cv-550

LUXOTTICA RETAIL NORTH AMERICA INC.

GEOTAG, INC.,

v.

2:12-cv-551

NATIONAL VISION INC.

GEOTAG, INC.,

v.

2:12-cv-552

U.S. VISION INC.

GEOTAG, INC.,

v.

2:12-cv-553

WILD BIRDS UNLIMITED INC.

GEOTAG, INC.,

v.

2:12-cv-554

JOS. A. BANK CLOTHIERS INC.

GEOTAG, INC.,

v.

2:12-cv-555

BUTH-NA-BODHAIGE INC.

GEOTAG, INC.,

v.

2:12-cv-556

PSP GROUP, LLC

GEOTAG, INC.,

v.

2:12-cv-557

RITZ INTERACTIVE LLC

DEFENDANTS' MOTION FOR ENTRY OF FIRST AMENDED PROTECTIVE ORDER

The Parties have reached agreement on numerous aspects of a First Amended Protective Order. Points of disagreement remain, however. Many of Plaintiff's proposals are unworkable given the large number of Defendants in these actions or directly contradict what Plaintiff has already agreed to in the Delaware Declaratory Judgment Action. Accordingly, the under-signed Defendants respectfully request that the Court enter Defendants' Proposed First Amended Protective Order (attached as Exhibit A). Defendants' positions are outlined below.

A. Section 5(a) – Making Source Code Available

Defendants propose that a Producing Party may make source code available “[i] at a secure third party facility located in the Dallas, Texas metropolitan area . . . or, [ii] at the office of counsel for the Producing Party, [iii] or at a location mutually agreed upon by the Receiving and Producing Parties, [iv] or as permitted under the Federal Rules of Civil Procedure.” (See Exhibit A at § 5(a)) (numerals added)). Plaintiff, however, seeks to inappropriately restrict these reasonable production options to (i) a single secure third party facility located in the Dallas, Texas metropolitan area, (ii) at the office of Texas counsel for the Producing Party, or (iii) at a location mutually agreed upon by the Parties.

Defendants proposal is appropriate because the relevant source code is located across the country and Plaintiff has counsel similarly located around the country. In particular, Plaintiff's present counsel in this case reside in (i) Dallas, Texas; (ii) Chicago, Illinois; and (iii) San Jose, California.¹ Accordingly, wherever any Defendant chooses to produce its source code will be convenient to Plaintiff's counsel. Conversely, forcing any Defendant to produce its source code at particular locations in Texas does not make things more convenient for anybody—including

¹ Plaintiff recently added new counsel to its stable of counsel in the Delaware litigation involving the same patent. Plaintiff's counsel in that case reside in Wilmington, Delaware and Andover, Massachusetts. *See Microsoft Corp. v. GeoTag, Inc.*, Case No. 1:11-cv-175 (D. Del.).

Plaintiff. In addition, due to the sensitive nature of the source code materials and the procedures for administering the production of such materials agreed to as set forth in the Amended Protective Order, allowing the Defendants to choose among very reasonable and convenient locations for productions assures that minimal chance for inadvertent productions or variance from the procedures set forth in the agreement will occur. Also, Plaintiff has not explained why Defendants' proposal presents any hardship to Plaintiff when in the Delaware Action Plaintiff agrees to review Source Code "at the offices of the producing party's primary outside counsel of record in this action in Palo Alto, California . . ." *Microsoft Corp., et al. v. GeoTag, Inc.*, Case No. 1:11-cv-175, at 13 (D. Del. April 3, 2012) (attached as Exhibit B). Further, Plaintiff provides no justification for refusing to permit a Defendant to provide its source code for inspection at its offices where kept in the ordinary course of business and as envisioned by Federal Rule of Civil Procedure 34.

B. Section 5(a)(2) – Media within source code review room

In the event that source code is made available in a secure source code review room, Defendants propose that "[n]o recordable media or recordable devices," including computers and cellular telephones with cameras be permitted in the room housing the stand-alone computer containing the Source Code." (See Exhibit A at § 5(a)(2)). Plaintiff, however, requests that the Receiving Party be allowed to "bring with it to the secure offices a cell phone and a notetaking computer."

Defendants' Source Code is some of the most highly important and sensitive material that Defendants will disclose in this litigation. Defendants do not want to create the opportunity for even inadvertent copying of Source Code in circumvention of the carefully drafted Source Code provisions of the Protective Order. Defendants are willing to allow the use of a cell phone and notetaking computer near the secure room, but not in it. Also, Plaintiff provides no explanation

regarding why a cell phone and notetaking computer is not needed in the Delaware Action,² but is needed here.

C. Section 5(c) – Format of source code production

Defendants propose that “all Source Code shall be produced or made available in electronic native format, to the extent it exists in that format and can be produced or made available in that format without undue burden.” (*See Exhibit A at § 5(c)*). Plaintiff inappropriately requests an additional requirement that all source code also be made available in “compilable form.”

The Defendants’ Source Code relevant to this case typically consists of the code related geographic search functions on web pages and operates in conjunction with the other source code that undergirds the general functions of those web pages. Defendants have agreed to make available the relevant Source Code related to geographic search, and an expert in the art would be able to understand such Source Code. However, Plaintiff’s demand that code be made available in “compilable form” may require Defendants to produce all of the source code related to their web pages, which is unduly burdensome given the scope of this litigation. Also, Plaintiff again provides no explanation of why code in compilable form is needed here, but is not needed in the Delaware Action.³

² “Source Code will be loaded on up to five non-networked computers, or more upon motion of a Party for good cause shown, that are password protected and maintained in a secure, locked area. Use or possession of any input/output device (e.g., USB memory stick, cameras or any camera-enabled device, CDs, floppy disk, portable hard drive, laptop, etc.) is prohibited while accessing the computer containing the Source Code. All persons entering the locked room containing the Source Code must agree to submit to reasonable security measures to insure they are not carrying any prohibited items before they will be given access to the locked room.” Exhibit B at 13.

³ *See Exhibit B* (containing no requirement that code be in compilable form).

D. Section 5(f) – Viewing and Searching Tools

In the event that source code is made available in a secure source code review room, Defendants propose that “the Producing Party shall install tools that are sufficient for viewing and searching the produced Source Code . . .” (*See Exhibit A at § 5(f) (emphasis added)*). In addition, Defendants propose that the Receiving Party be allowed to request additional tools if the Receiving Party believes it necessary to perform its review of the source code. Plaintiff, however, proposes that the Producing Party make available tools for viewing, searching, and analyzing the source code, and further inappropriately demands that such tools shall include “Visual Studio” and “Understand.”

Defendants have agreed to install viewing and searching tools for the use of Plaintiff’s expert. Plaintiff has failed to explain why this is insufficient here when they agree to a similar provision in the Delaware Action and are not requiring analysis tools in that case.⁴

E. Section 5(g)(1) – Printing Paper Copies of Source Code

Defendants have agreed to allow Plaintiff to receive “35 printed pages [of continuous Source Code] or more than 500 pages of Source Code in total.” (*See Exhibit A at § 5(g)(1)*). Nonetheless, Plaintiff also requests that, in the event that additional Source Code is required to be printed by Plaintiff, that Defendants bear the burden of proving pages in excess of 500 total pages is unreasonable. Plaintiff, however, fails to provide any reasoning as to why it would need more than 500 total pages of Source Code. Indeed, in some cases, the entire body Source Code encompassing the accused functionality is less than 500 pages. Thus, if Plaintiff should require additional pages, Defendants respectfully request that Plaintiff should have the burden of showing good cause for such excess. Defendants have gone beyond the provisions that Plaintiff

⁴ “The receiving party’s outside counsel and/or experts may request that commercially available licensed software tools for viewing and searching Source Code be installed on the secured computer.” *See Exhibit B at 13.*

agrees to in the Delaware Action which contains no explicit allowance for Source Code printing in excess of thirty-five (35) page consecutive pages or 500 pages in aggregate total.⁵

F. Section 7 – Prosecution Bar

Given the large number of defense counsel and defense firms involved in this litigation, Defendants propose the Prosecution Bar contained in § 7 of the attached Exhibit A. Plaintiff, however, seeks to extend the Prosecution Bar to all Defendants and counsel involved in this litigation. Plaintiff's attempt to bar hundreds of lawyers from an amorphous practice that is fraught with uncertainty of scope, based on materials surrounding a 1996 disclosure, is vastly overreaching.

The '474 Patent was filed on January 31, 1996 and discloses material that is over 15 years old. On the flip side, Plaintiff will undoubtedly seek production of Defendants' current, highly sensitive technical materials—such as the present-day software relating to Defendants' websites. It is Plaintiff's exposure to this current technical information that requires the protections of a Prosecution Bar, as it is the state of the art technology (rather than materials over 15 years old) that pose the greatest risk in a patent prosecution context. This is especially true in a rapidly-advancing field, such as computer science.

Second, Plaintiff initiated this litigation alleging infringement of the '474 Patent. The Technical Protected Materials to be produced by Plaintiff, if any,⁶ would necessarily be relevant to the '474 Patent. The '474 Patent must (by definition) sufficiently disclose the invention, and the manner and process of making and using it, in full and clear detail. (*See* 35 U.S.C. § 112). Therefore, the risk to Plaintiff from Defendant's review of Technical Protected Material relevant to the '474 Patent is minimal at best, and to the extent any risk exists, it is a risk the Plaintiff knew of and accepted when it elected to litigate the '474 Patent.

⁵ See Exhibit B at 14.

⁶ When asked during the meet-and-confer, counsel for Plaintiff stated it did not know if Plaintiff would have any source code to produce.

Dated: September 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on September 27, 2012, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel has complied with the meet and confer requirement of Local Rule CV-7(h). The Parties conferred by telephone and web conference on September 27, 2012 in good faith in an attempt to reach an agreement regarding the terms of the proposed Protective Order. The Parties were unable to reach an agreement on all provisions. Discussions have conclusively ended in an impasse, leaving an open issue for the Court to resolve

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